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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE DISTRICT OF OREGON

10 DELLA F. SALMON,

Civil No. 06-6279-AA  
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,  
Commissioner of Social Security,

14 Defendant.

15  
16 Kathryn Tassinari  
Drew L. Johnson  
Drew L. Johnson, P.C.  
17 1700 Valley River Drive  
Eugene, Oregon 97401  
18 Attorneys for plaintiff

19 Karin Immergut  
United States Attorney  
20 District of Oregon  
Britannia Hobbs  
21 Assistant United States Attorney  
1000 S.W. Third Avenue  
22 Portland, Oregon 97204-2902

23 Joanne Dantonio  
Special Assistant U.S. Attorney  
24 Social Security Administration  
701 Fifth Avenue, Suite 2900 M/S 901  
25 Seattle, Washington 98104-7075  
Attorneys for defendant

26 AIKEN, Judge:

27 Claimant, Della F. Salmon, brings this action pursuant to  
28

1 the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and  
2 1383(c)(3), to obtain judicial review of a final decision of the  
3 Commissioner denying her application for disability insurance  
4 benefits under Title II of the Act. For the reasons set forth  
5 below, the Commissioner's decision is reversed and remanded for  
6 payment of benefits.

#### 7 **PROCEDURAL BACKGROUND**

8 On May 7, 2003, plaintiff applied for disability benefits,  
9 reporting that she had been disabled since March 8, 2002. Tr.  
10 48-50. Plaintiff's application was denied initially, although  
11 she was awarded benefits with a later onset date of April 1,  
12 2003. Tr. 34. Plaintiff requested a hearing before an  
13 Administrative Law Judge (ALJ) asserting she had been disabled  
14 since March 8, 2002. Tr. 36. On January 5, 2006, plaintiff  
15 appeared with counsel for a hearing before an ALJ. Tr. 317-50.  
16 On May 11, 2006, the ALJ issued an unfavorable decision. Tr. 10-  
17 21. On November 12, 2006, the Appeals Council denied plaintiff's  
18 request for review, tr. 7-9, making the ALJ's decision the final  
19 agency decision. See 20 C.F.R. §§ 416.1481, 422.210.

#### 20 **STATEMENT OF THE FACTS**

21 At the time of the hearing, plaintiff was 55 years old.  
22 Tr. 324. Plaintiff attended school through Ninth grade. Id.  
23 Plaintiff worked in the past as a Certified Nursing Assistant  
24 (CNA), salesperson, care giver, and sweeper/cleaner. Tr. 340-41.  
25 Plaintiff last worked in 2003. Tr. 324.

#### 26 **STANDARD OF REVIEW**

27 This court must affirm the Secretary's decision if it is  
28 based on proper legal standards and the findings are supported by

1 substantial evidence in the record. Hammock v. Bowen, 879 F.2d  
2 498, 501 (9th Cir. 1989). Substantial evidence is "more than a  
3 mere scintilla. It means such relevant evidence as a reasonable  
4 mind might accept as adequate to support a conclusion."  
5 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting  
6 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).  
7 The court must weigh "both the evidence that supports and  
8 detracts from the Secretary's conclusions." Martinez v. Heckler,  
9 807 F.2d 771, 772 (9th Cir. 1986).

10 The initial burden of proof rests upon the claimant to  
11 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486  
12 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate  
13 an "inability to engage in any substantial gainful activity by  
14 reason of any medically determinable physical or mental  
15 impairment which can be expected . . . to last for a continuous  
16 period of not less than 12 months. . . ." 42 U.S.C.  
17 § 423(d)(1)(A).

18 The Secretary has established a five-step sequential  
19 process for determining whether a person is disabled. Bowen v.  
20 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,  
21 416.920. First the Secretary determines whether a claimant is  
22 engaged in "substantial gainful activity." If so, the claimant  
23 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.  
24 §§ 404.1520(b), 416.920(b).

25 In step two the Secretary determines whether the claimant  
26 has a "medically severe impairment or combination of  
27 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.  
28 §§ 404.1520(c), 416.920(c). If not, the claimant is not

1 disabled.

2 In step three the Secretary determines whether the  
3 impairment meets or equals "one of a number of listed impairments  
4 that the Secretary acknowledges are so severe as to preclude  
5 substantial gainful activity." Id.; see 20 C.F.R.

6 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively  
7 presumed disabled; if not, the Secretary proceeds to step four.  
8 Yuckert, 482 U.S. at 141.

9 In step four the Secretary determines whether the claimant  
10 can still perform "past relevant work." 20 C.F.R.

11 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not  
12 disabled. If she cannot perform past relevant work, the burden  
13 shifts to the Secretary. In step five, the Secretary must  
14 establish that the claimant can perform other work. Yuckert, 482  
15 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &  
16 (f). If the Secretary meets this burden and proves that the  
17 claimant is able to perform other work which exists in the  
18 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,  
19 416.966.

## 20 DISCUSSION

21 At step one of the five step sequential evaluation process  
22 outlined above, the ALJ found that plaintiff had engaged in  
23 substantial gainful activity since April 1, 2003. Tr. 15,  
24 Finding 1. This finding is not in dispute. At step two, the ALJ  
25 found that plaintiff had the severe impairment of chronic  
26 obstructive pulmonary disease/asthma. Tr. 17, Finding 2. This  
27 finding is not in dispute. At step three, the ALJ found that  
28 plaintiff's impairments did not meet or equal the requirements of

1 a listed impairment at any time prior to April 1, 2003. Tr. 17,  
2 Finding 4. This finding is in dispute.

3 The ALJ determined that prior to April 1, 2003, plaintiff  
4 had the residual functional capacity (RFC) to perform light work,  
5 with the ability to lift 20 pounds occasionally and 10 pounds  
6 frequently and with the need to avoid concentrated exposure to  
7 fumes, odors, gasses and poor ventilation. Tr. 18.

8 At step four, the ALJ found that plaintiff was not able to  
9 perform her past relevant work. Tr. 17. Finally, at step five,  
10 the ALJ found that, based on plaintiff's RFC, she could perform  
11 work existing in significant numbers in the national economy;  
12 specifically as a ticket seller, electronics worker, or bench  
13 assembler. Tr. 19-20. The ALJ found, therefore, that plaintiff  
14 was not disabled from March 8, 2002, through March 31, 2003. Tr.  
15 21.

16 Because there has been a determination that plaintiff  
17 became disabled at some point, "SSR 83-20 requires that the ALJ  
18 create a record which forms a basis for that onset date."  
19 Armstrong v. Commissioner, 160 F.3d 587, 590 (9<sup>th</sup> Cir. 1998). The  
20 inference of a onset date "must have a legitimate medical basis."  
21 Id. To accomplish this, "[a]t the hearing, the [ALJ] should call  
22 on the services of a medical advisor when onset must be  
23 inferred." Id. Further, "the date alleged by the individual  
24 should be used if it is consistent with all the evidence  
25 available." Id.

26 Defendant asserts that plaintiff's alleged onset date of  
27 March 8, 2002, is inconsistent with the medical evidence;  
28 specifically the pulmonary function testing, chest x-rays, and

1 evidence showing that plaintiff's medical condition had generally  
2 improved. Defendant, however, requests this court reverse the  
3 ALJ's finding and remand this action for additional proceedings  
4 to properly address the opinion of Dr. Nyquist, plaintiff's  
5 treating physician, and to properly address the ALJ's credibility  
6 finding regarding plaintiff. Conversely, plaintiff moves to  
7 reverse and remand for payment of benefits asserting that the ALJ  
8 erred in failing to properly credit plaintiff's treating  
9 physician's opinion and erred in finding her not credible.

10 Plaintiff's Treating Physician

11 On March 7, 2002, Dr. Nyquist, plaintiff's treating  
12 physician, examined plaintiff for severe shortness of breath that  
13 had been increasing over the past three days. Tr. 228. Dr.  
14 Nyquist found slight retractions around her ribs, moderately to  
15 severely diminished breath sounds and moderate to severe wheezing  
16 bilaterally. Id. Her extremities had trace edema. Id. Dr.  
17 Nyquist diagnosed plaintiff with bronchitis and moderate to  
18 severe asthma. Id. On March 9, 2002, plaintiff sought emergency  
19 treatment for an asthma flare-up. Tr. 137. The attending  
20 physician described plaintiff as somewhat ill-appearing in  
21 moderate respiratory distress. Id. Her oxygen saturation rate  
22 was 78 percent on room air, and her skin appeared dusky and  
23 cyanotic. Id. She was mildly tachycardic and her capillary  
24 filling was diminished. Tr. 138. Plaintiff was diagnosed with  
25 acute dyspnea secondary to reactive airway disease/chronic  
26 obstructive pulmonary disease (COPD) with acute flare with  
27 secondary chest pressure. Id. Dr. Nyquist noted that, "patient  
28 presents with shortness of breath now of one week's duration with

1 progression despite outpatient management. She has been treated  
2 with aggressive bronchodilator therapy. She is improving but  
3 still quite symptomatic." Tr. 139. Dr. Nyquist ultimately  
4 admitted plaintiff to the hospital. Id. Plaintiff was  
5 discharged from the hospital March 14, 2002, with a diagnosis, in  
6 part, of "severe exacerbation of reactive airway disease." Tr.  
7 132, 139. On March 18, 2002, plaintiff was again seen by Dr.  
8 Nyquist. Tr. 226. She remained on her discharge medications,  
9 her extremities had trace edema bilaterally and his impression  
10 was COPD exacerbation and pneumonia, improving. Id.

11 In April 2002, Dr. Nyquist saw plaintiff who asked if she  
12 may return to work. Dr. Nyquist stated that plaintiff could  
13 return to light duty work for up to four to six hours a day,  
14 although she "must be" sitting for at least half of that time.  
15 Tr. 226. Plaintiff then sought emergency treatment in August  
16 2002, for increased wheezing and shortness of breath. Tr. 203.  
17 Her peak flow was measured at 150, which was consistent with  
18 moderate chronic obstructive airway disease. Id. Plaintiff was  
19 administered two nebulizer treatments, and was discharged home on  
20 prednisone and a Ventolin inhaler. Tr. 204.

21 Later that month in August 2002, plaintiff's employment was  
22 terminated due to excessive absences. Tr. 61. Plaintiff was  
23 hired on July 5, 2002, and called in ill nine times in seven  
24 weeks. Id.

25 On January 8, 2003, plaintiff was hospitalized for  
26 shortness of breath. Tr. 199. Plaintiff reported that she  
27 became acutely short of breath with any physical movement. Id.  
28 The attending physician found plaintiff to have obvious increased

1 work of breathing, poor airflow throughout her chest, diffuse  
2 soft expiratory wheezes and a prolonged expiratory phase. Tr.  
3 200. The doctor diagnosed plaintiff with emphysema, advanced  
4 with exacerbation, chronic active tobacco use and an abnormal  
5 electrocardiogram. Id.

6 On January 30, 2003, plaintiff saw Dr. Paula Nelson, a  
7 family practitioner. Tr. 217. Plaintiff's shortness of breath  
8 and cough had improved with medication. Id. Dr. Nelson reviewed  
9 plaintiff's EKG which showed moderately severe pulmonary  
10 hypertension. Id.

11 \_\_\_\_\_ On March 9, 2003, plaintiff again sought emergency  
12 treatment for shortness of breath. Tr. 168. She was working  
13 part-time as a housekeeper and smoking a half a pack of  
14 cigarettes per day. Id. The attending physician found that  
15 plaintiff was breathing with some difficulty. Id. The physician  
16 treated her with respiratory therapy and prescribed prednisone.  
17 Tr. 169. Plaintiff's condition worsened, and on March 10, 2003,  
18 plaintiff saw Dr. Mary Morehouse, D.O. for shortness of breath.  
19 Tr. 149. Her oxygen saturation rate was 82 percent on room air,  
20 and only increased to 87 percent after Solu-Medrol and breathing  
21 treatments with Xopenex and Pulmicort were administered. Id.  
22 Plaintiff experienced difficulty breathing and shortness of  
23 breath brought on by physical exertion. Id. Dr. Morehouse  
24 admitted plaintiff to the hospital with COPD exacerbation with  
25 probable bronchitis/pneumonia. Tr. 150. Plaintiff's diagnoses  
26 upon discharge were COPD exacerbation and possible congestive  
27 heart failure. Tr. 148. Her discharge medications included:  
28 Advair, aspirin, Cardizem, Lexapro, Combivent, Zithromax, and



1       prednisone. Id.

2       \_\_\_\_\_On August 9, 2003, plaintiff saw Dr. Rick Salisbury, an  
3       internist. Tr. 265. Dr. Salisbury concluded that plaintiff had  
4       "severe COPD." Id. On August 25, 2003, Dr. Salisbury noted that  
5       plaintiff was limited in her walking and other activities. Tr.  
6       264. Dr. Salisbury also noted that he had received plaintiff's  
7       medical records which showed that in August 2002, plaintiff's FVC  
8       was 83 percent of predicted, her FEVI was "only" 52 percent of  
9       predicted, and her FEF was "only" 14 percent of predicted. Tr.  
10      263.

11      \_\_\_\_\_It is notable that although plaintiff had periods of  
12      improvement with treatment, she was never able to return to work  
13      on a sustained basis. The issue is whether plaintiff has the RFC  
14      for "work activity on a regular and continuing basis." 20 C.F.R.  
15      §§ 404.1545, 416.945. "Occasional symptom-free periods - and  
16      even the sporadic ability to work - are not inconsistent with  
17      disability." Lester v. Chater, 81 F.3d 821, 833 (9<sup>th</sup> Cir. 1995).  
18      The Ninth Circuit holds that an RFC involves the ability to  
19      tolerate a "sustained daily work routine" at the level of  
20      exertion being considered. Cox v. Califano, 587 F.2d 988, 990  
21      (9<sup>th</sup> Cir. 1978). The evidence in the record, including the  
22      doctor's and hospital's records during the time period at issue,  
23      support the conclusion that plaintiff was unable to "sustain a  
24      daily work routine" at the light exertional level.

25             The court should reverse and remand an ALJ's decision for  
26      an award of benefits if: (1) the ALJ failed to provide legally  
27      sufficient reasons for rejecting the evidence; (2) there are no  
28      outstanding issues that must be resolved before a determination

1 of disability can be made; and (3) it is clear from the record  
2 that the ALJ would be required to find the claimant disabled were  
3 such evidence credited. Benecke v. Barnhart, 379 F.3d 587, 594  
4 (9<sup>th</sup> Cir. 2004). Based on the evidence in the record, I find it  
5 appropriate to reverse and remand this decision for payment of  
6 benefits. During the year at issue, plaintiff sought emergency  
7 treatment three times and was hospitalized twice. Tr. 148-50,  
8 99-200, 203. Then, in August 2002, plaintiff's employment was  
9 terminated due to excessive absences. Finally, there is no  
10 evidence of malingering. Plaintiff has satisfactorily established  
11 an onset date of March 8, 2002.

#### 12 **CONCLUSION**

13 The Commissioner's decision is not supported by substantial  
14 evidence and is therefore reversed and remanded for payment of  
15 benefits. Further, the Commissioner's motion to remand (doc. 19)  
16 is denied.

17 IT IS SO ORDERED.

18 Dated this 5 day of November 2007.

19  
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21  
22 /s/ Ann Aiken

23 Ann Aiken  
24 United States District Judge  
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